



CALIFORNIA DEPARTMENT OF
FOOD & AGRICULTURE

A. G. Kawamura, Secretary

**CEQA Analysis of Dairy Pricing
Response to Initial Study Comments
October 20, 2006**

Comments of Milk Producer's Counsel and Dairy Institute

Whether and the degree to which CDFA must analyze potential indirect environmental consequences is the heart of the objections to CDFA's Initial Study for the July 21, 2006, milk price decision.

The comments from both the Milk Producers' Council ("MPC") and Dairy Institute ("Institute") regard the degree of review required by CEQA of actions which might be taken by others. Milk Producers' Council argues that the future actions make CDFA's milk pricing decision a project pursuant to CEQA and warrant preparation of an environmental impact report; the Dairy Institute would sever those other actions from the price change to allege that the pricing decision is not a project warranting any CEQA review. The potential environmental impacts at issue are potential indirect impacts; there was no argument that the price change would result in a direct physical change in the environment.

CDFA Response to the Comments follows:

None of the comments provides any substantial evidence to warrant revision of the Department's decision to adopt a negative declaration. An EIR is required if there is substantial evidence before the agency to support a fair argument that environmental impacts might result from an activity. The Milk Producers' Council and the Center on Race, Poverty and the Environment ("CRPE") have only speculated future events. Speculation does **not** constitute substantial evidence and is not required by CEQA or in CEQA analysis.

CDFA Reasoning

The court has succinctly described the CEQA review process as a three-tiered structure: first: if a proposed project falls within a category exempt from the requirements of CEQA by administrative regulation, or if it is certain that the project will not have a significant effect upon the environment, no further agency evaluation is required. Second: if there is a possibility that the project may have a significant environmental effect, the agency must conduct an initial threshold study. If the initial study reveals that the project will not have such effect, the lead agency may complete a negative declaration briefly describing the reasons supporting this determination. But, third: only if the project may have a significant effect on the environment, must an EIR be prepared.

At its heart, CEQA is a notice statute in that it requires decision-makers to consider the environmental impacts of their decisions; in this regard, environmental impact reports have been called an "environmental alarm bell." However, CEQA does not require the impossible or needless efforts.

In order to determine whether or not an activity is a project pursuant and subject to CEQA, a "chain of events" test is applied. For an activity to be a "project" requiring environmental review, it need not have a direct effect on the environment, but it must be "a necessary step in a chain of events which would



culminate in physical impact on the environment." In one exemplary case, the court then held that a formation of a public services district did not constitute a project because the formation merely provided funding without any commitment to any specific course of action; there was no causal link between the government action (formation of the district) and any environmental impacts. This reasoning is cited by the Institute as authority for its argument.

MPC bases its arguments upon CEQA's requirements that an agency consider the "whole of the action" in ascertaining whether the price change may cause indirect environmental impacts. MPC argues that the whole of the action includes activities undertaken by producers and processors to exploit the change. This "whole of the action" argument is the basis for MPC's allegation that CDFA improperly broke the project into segments.

While MPC's contention is within the scope of CEQA law, it is misplaced in this context. The cases establishing the "chain of events" test also discuss the early CEQA cases which rejected segmentation of projects. The determinative factor is whether there is a causal connection between the proposed activity and the subsequent activities. Where the courts have found an applicant to have divided a large project into small segments to avoid CEQA review, a causal connection has been found if the proposed activity is a necessary step in the ultimate or subsequent actions. Absence of the causal connection severs the proposed activity from the subsequent actions, leaving the proposed action to be evaluated on its own merits.

Although one might argue that CDFA's Initial Study confirms that the proposed pricing decision is not a project, CDFA prepared the study to ensure full consideration of the potential for environmental impacts. After having published the study to the public and accepting comments, CDFA adopted a negative declaration finding that there is no substantial evidence to support a fair argument that the pricing decision would cause any environmental impacts. In so doing, CDFA eschewed truncated review in favor of substantive review and public comment. Therefore, adoption of the negative declaration was consistent with CEQA law.

Another aspect of MPC's argument is their assertion that by not considering the potential impacts of future private actions, CDFA violated CEQA law by breaking the whole project into small segments. There have been instances where an agency has been ordered to examine the whole activity including future actions to ascertain potential environmental impacts. However, similar to the discussion above, in those instances, there has been a causal linkage between the specifically proposed activity and the resulting impacts.

CEQA's treatment of segmenting is related to the issues of speculation, cumulative impacts, and ultimately, the broader CEQA goals of meaningful review and informed decision-making. Therefore, the CEQA statutes, guidelines and case law often overlap among these issues. The cases find a causal connection when a proposed project is either one part of a large project or where approval of one proposal effectively approves the future proposals.

There is a two-prong test to ascertain whether future phases of one project must be included in an EIR for the present project. First: are the future projects reasonably foreseeable consequences of the initial project, and second: will the future phases likely change the scope or environmental effects of the initial project. Cases applying this standard have closely examined the facts to ascertain whether the initially described project was a part of a larger overall plan to be undertaken by the project applicant; they do not suggest that an applicant must speculate regarding what others might do as a result of their project. According to this test, the reasonable foreseeability of future actions is determinative. Even future potential actions which may be taken by the applicant as a result of the present project are not always reasonably foreseeable.

This reasoning is also found in the cases where explorative activities were approved. In those matters, the courts recognized that until the exploration was completed, there would be "no reliable data, other than the vaguest kind," upon which to prepare a truly meaningful EIR.

Other cases have applied a "chain of events" test to ascertain whether future actions must be considered

in either an EIR or a negative declaration. These cases are fully in accord with CEQA rule and policy discussed above. Moreover, they are consistent with the intent underlying CEQA which is to require that decision-makers meaningfully consider the environmental effects of their decisions, and mitigate to the extent feasible the reasonably foreseeable impacts.

The proposition that an EIR was warranted was first raised in written hearing testimony submitted by the Center on Race, Poverty and the Environment (CRPE). CRPE did not submit comments in response to CDFA's Initial Study. CEQA requires that an objector exhaust their administrative remedies before initiating litigation to challenge a decision on CEQA grounds. But, no one objected to the Initial Study's conclusions. By not commenting upon the Initial Study, CRPE has failed to exhaust its administrative remedies and cannot participate in a court action to invalidate the negative declaration. As importantly, their failure to comment might suggest that CRPE did not find fault with the Initial Study. In any event, a failure to exhaust their administrative remedies regarding these issues alone can be the basis of sustaining the adoption of the negative declaration.

In their comment upon the Initial Study, the Milk Producers' Council (MPC) also argued that an EIR was in order, but MPC provided no evidence; MPC offered only speculation and argument.

CEQA Does Not Require Analysis of Speculative Events. While CEQA must be broadly interpreted to give the greatest possible protection to the environment, the foregoing clearly indicates that CEQA is also governed by the rule of reasonableness. Reasonableness is recognized as a foundational CEQA precept; CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." Furthermore, the courts have recognized that despite the open-endedness of CEQA statutes, CEQA does not require needless review: "the purpose of CEQA is not to generate paper."

An EIR is required if there is substantial evidence before the agency to support a fair argument that environmental impacts might result from an activity. However, speculation does not constitute substantial evidence and is not required by CEQA or in CEQA analysis.

CDFA's negative declaration was based upon the absence of substantial evidence; instead of "facts" regarding potential impacts, CDFA had only argument and speculation regarding the potential indirect environmental impacts which might result from the Department's purely economic action. The existence of only argument and speculation does not warrant preparation of an EIR and prevents the meaningful consideration of potential impacts prescribed by CEQA.

The CRPE and MPC argued (but did not offer substantial evidence) that reduction of the milk price would result in construction or operation of more cheese- processing facilities and also cause the addition of dairy cows to serve the needs of the increased cheese manufacturing. This argument assumes that increased processing and milk production would have environmental impacts. CRPE premised their argument on the assertion that the environmental impacts would degrade water quality and, until milk processors and dairy farmers are adequately regulated by the water quality regulators, CDFA should not facilitate the addition of these facilities. MPC's comments concurred with the CRPE.

Neither the CRPE nor the MPC cited any particular facilities which increase milk or cheese production. Both comments were premised upon assumptions that lower prices will ultimately result in more production and therefore more environmental impacts. However, as discussed in the Initial Study, absent any information regarding who will increase capacity and how they will increase their capacity, CDFA has no way to ascertain potential environmental impacts.

Making assumptions regarding the ultimate physical impacts of economic signals is speculative at best. It is only reasonable to conclude that some farmers and processors might increase or decrease capacity. Absent facts regarding who might do what, how they might do it, and where they might do it prevents any meaningful analysis of potential environmental impacts of their actions.

Since speculation is not required, a detailed environmental analysis of every precise use that may conceivably occur is not necessary. The court recently determined that an EIR was satisfactory, although

the EIR did not consider the impacts of potential and projected, but still speculative, future development. Premature environmental review requires speculation as to possible future environmental consequences, a needlessly wasteful drain of the public funds. It is unnecessary to engage in "sheer speculation as to future environmental consequences," and it is unreasonable to expect an EIR to "produce detailed information about the environmental impacts of a future regional facility whose scope is uncertain. Until specific future projects are proposed and the details fleshed out, the environmental impacts remain "abstract and speculative." Where far too little is known about the scope, the location, or the types of projects that might be proposed in the future, decision-makers cannot evaluate the potential environmental tradeoffs.

Having determined that projections of environmental effects of the price change would be speculative, CDFA had grounds to conclude that it had no substantial evidence, such as facts or reasonable assumptions based upon those facts, to conclude that any adverse environmental impacts would result from the price change. Therefore, CDFA was correct to conclude that there was no substantial evidence of potential environmental impacts. Upon drawing this conclusion, CDFA acted in conformance with CEQA Guideline Section 15064(f)(3) by adopting a negative declaration for the price change. Moreover, by conducting an Initial Study and subjecting the Study to public review and comment, CDFA conducted a thorough investigation, and further review was not warranted as provided by Guidelines section 15145.

MPC was incorrect in its allegation that simply because CDFA conducted an initial study, CDFA was recognizing that preparation of an EIR is necessary to support adoption of the price change. CDFA made no such admission. The text of the Initial Study explicitly stated that its purpose was "...to ascertain what, if any, potential direct or reasonably foreseeable indirect change in the physical environment the proposed activity will cause, and to ascertain whether and/or what level of review is required by the [CEQA]."

If challenged, CDFA's decision as to the negative declaration would be subject to a higher threshold and afforded more deference than had it declared the price change to not be a project and not conducted an Initial Study. Consequently, adoption of the negative declaration would meet the appropriate threshold.

CDFA's decision that a negative declaration was the appropriate action is clearly correct. No facts were presented upon which to base a conclusion that lower prices would result in increased milk production or processing or adverse environmental impacts. Although the balance of supply and demand is an economic precept, so is the relationship to price and demand. CDFA's Initial Study explained in detail why it was not reasonable to conclude whether, if any, environmental impacts would be caused by the price change. Although the price change was expected and intended to encourage increases in processing capacity, CDFA cannot and does not require that processors increase their capacity. Whether processors take such action is entirely within their own discretion and, consequently, the price change is not a necessary step in the increased processing; there is no causal link between CDFA's action and processors' actions or the environmental impacts which could result therefrom.

CEQA requires that an objector exhaust their administrative remedies before initiating litigation to challenge a decision on CEQA grounds. But, there weren't objections to every one of the Initial Study's conclusions. CRPE's failure to comment constitutes failure to exhaust administrative remedies; therefore, CRPE cannot participate in a court action to invalidate the negative declaration. Similarly, although MPC made arguments regarding alleged inadequacies in the analysis, MPC did not exhaust their administrative remedies regarding all of the grounds for adoption of the negative declaration. Therefore, the CDFA's adoption can be sustained on this ground alone.

By adopting a negative declaration, CDFA moots the Dairy Institute's argument that the price change constitutes a "project" under CEQA. CEQA does not prohibit an agency from exceeding CEQA's requirements, and the fact that CDFA prepared an Initial Study in this case does not require or preclude CDFA from any other type of environmental review of future price changes. Neither CRPE nor MPC provided any facts upon which to base a conclusion that the price change might result in environmental impacts; absent such facts, their assertions are arguments and speculation, neither of which constitute substantial evidence to mandate preparation of an EIR. Moreover, failure to exhaust their administrative remedies regarding all of CDFA's conclusions leaves some grounds for adoption unchallenged and

effectively precludes CRPE and MPC from prevailing in a court action to invalidate the negative declaration. However, CRPE's failure to object to the Initial Study might be most illustrative in that it suggests that CRPE did not find fault with the Initial Study.

Since an Initial Study was conducted, adoption of negative declaration is supportable unless there is substantial evidence that environmental impacts may occur; no such substantial evidence is before CDFA. CDFA's adoption of a negative declaration constitutes compliance with CEQA's requirements.